LE COPY

FILED
JAN 6 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 544

SEABOARD MACHINERY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF OF SEABOARD MACHINERY CORPORATION TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

LEO L. FOSTER
Brock Building
Tallahassee, Florida

CHARLES M. TRAMMELL
HANS A. NATHAN
729 15th St., N.W.
Washington 5, D. C.
Counsel for Petitioner

Printed by Action Printing Co., 518 5th St. N.W., Wash., D. C.

INDEX

	Page
Introduction	1
Counter-Statement	2
Argument	5
Conclusion	12

CITATIONS

Cases:

Saunders v. *Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917) 11

Smith v. *Royal Ins. Co.*, 111 F. 2d 667 (C.A. 9, 1940), cert. den. *Royal Ins. Co.* v. *Smith*, 61 S. Ct. 43, 311 U.S. 676, 85 L. Ed. 435 7

Southwestern Graphite Co. v. *Fidelity and G. Ins. Corp.*, 201 F. 2d 553 (C.A. 5, 1953) 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 544

SEABOARD MACHINERY CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY BRIEF OF SEABOARD MACHINERY CORPORATION TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

INTRODUCTION

Petitioner files this Reply Brief for the reason that the Government's Brief in Opposition contains gross errors as to the "Questions Presented" and facts involved in this Petition. Moreover, by its misstatement of the "Questions Presented," the Government has brought into focus an ad-

ditional and extremely important reason for the granting of the Writ.

Pursuant to information obtained from the Clerk of the Court to the effect that such filing would be timely, this Reply Brief for Petitioner is filed on January 6, 1959, and respectively shows as follows:

COUNTER-STATEMENT

Reduced to a bare outline, without inferences or detail, the uncontrovertible facts giving rise to the instant case are as follows:

Petitioner leased part of a shipyard from the United States Government under an agreement of lease which fixed Petitioner-Lessee's responsibility and accountability, gave Petitioner-Lessee renewal privileges and an option to purchase, and required Petitioner-Lessee to procure and pay for fire insurance sufficient to permit reconstruction of any property destroyed. The amounts in which these insurances were required were determined in accordance with a Government Regulation (Pet., p. 8) which, as is conceded by the Government, was intended to protect the *lessee* by providing that in the event of a fire loss, all insurance proceeds should be devoted to the rehabilitation of the premises destroyed; i.e., in the event that the Government determined to restore the premises, proceeds could not be devoted to other purposes by the Government. Petitioner provided insurance in the amounts requested. Having ascertained that, under the law of Florida, the insurance policies became stated-value policies, Petitioner named itself and the Government insured, providing that benefits should be paid to the Government as stakeholder "*for the account of all interests*," thus emphasizing Petitioner's own interest in insuring itself with regard to improvements made by it, the leasehold and option, and policies so stating were in force with the Government's knowledge for more than a year prior to the fire.

A fire occurred, destroying part of the premises. Prior to such fire, Petitioner had indicated that it intended to exercise its option and the Government had set a price in accordance with the option provision, *after* the Secretary of Defense, through his duly delegated Agent, had given the necessary approval and made the determination that the property was available for sale.[1]

After the fire Petitioner accepted the Government's offer to sell the entire Yard at the Government's price. The Government had determined that it would not restore the destroyed property but had not withdrawn or rescinded its offer made under the option in the lease. The Government, however, then cancelled Petitioner's lease, refused to consummate the sale and intervened in two actions which had been brought by Petitioner against the Insurance Companies for the proceeds of the fire insurance, making a claim to all the proceeds of the policies covering the real property. With regard to the proceeds of the policy covering personal property, however, the Government claimed only a *part* of the proceeds (equal to the value of similar property in new condition at current market prices), although the provisions of the lease and insurance contracts were identical with regard to both real and personal property.

Prior to the cases being consolidated for trial, the Insurance Companies paid the full face value of both policies into the Registry of the Court and Petitioner claimed part of the funds on the alternative theories of ownership thereof,

---

[1] The Government's Brief in Opposition invites confusion with its less than candid argument as to the Option. The lease squarely provides that *prior* to September 4, 1954, this approval of disposal of the property was a condition precedent to exercise of the option to purchase. Significantly, it was when this was pointed out by Petitioner to the District Court, and when Petitioner stated that it believed that documentary proof of the sale approval reposed in Government files, that the United States Attorney, after consultation with the General Services Administration, agreed to limit the issue in the case to market value in consideration of Petitioner's abandonment of its claim to ownership of the property destroyed and restriction of pre-trial discovery. (Pet. p. 11-12.)

by exercise of the option, or of being beneficiary of funds exceeding the market value of the Government-owned property lost.

Pre-trial proceedings resulted in a stipulation—later formalized in a Holding by the trial Court—that the issue of the fair value of the Government-owned property lost was the sole issue to be tried. Petitioner's application for pre-trial discovery on issues relating to the exercise of the option and all other issues (except the stipulated issue of fair value of the Government property lost) was denied by the trial Court in accordance with the pre-trial stipulation and ruling, and no other issue was considered in all further pre-trial and trial proceedings.[2]

Pursuant to the agreement of the parties and the ruling of the Court, the Government formally amended its pleadings to claim only the "actual value" of its loss of real and personal property. (Pet. p. 11-12.)

The trial resulted in a Judgment for Petitioner. The Court of Appeals for the Fifth Circuit reversed the trial Court and, *de novo,* adjudicated and determined issues not raised below, considering alleged "evidence" not of Record and rendered Judgment for the Government—holding, in essence, that the stipulation was a mere matter of expediency and that neither the stipulation nor the pre-trial Order were binding on the Government on appeal and that furthermore, Petitioner had no insurable interest in the leasehold and option, nor any right to any part of the proceeds to the extent they were claimed by the Government.

---

[2] The Government made a pre-trial Motion for Summary Judgment which has been much relied on by the Government in its Brief in Opposition to support the proposition that the Government took and held to a position that it had the sole insurable interest in the real property lost and never waived any claim to *all* of the insurance proceeds. But, consistent with its stipulation limiting the issues, the Government in its Motion for Summary Judgment before the District Court did *not* claim it had the sole insurable interest in the property destroyed. The Government instead claimed that Petitioner, as "defaulting lessee," was estopped to claim any insurance proceeds because it had named itself co-insured—a novel proposition summarily rejected by the District Court.

ARGUMENT

The above factual situation clearly presents fundamental and far-reaching questions requiring the issuance of the Writ as set out in the original Petition.

The Government, in its Brief in Opposition, completely ignores and side-steps these fundamental questions involving issues of far-reaching importance in the administration of justice in the Federal Courts, as to whether a pre-trial limitation of issues arrived at by stipulation between Counsel for the Government and Counsel for a private party can be set aside, ignored and disregarded by the Court of Appeals.[3] This is done in the face of the express Holding of the Court of Appeals in its Opinion on Rehearing that, "We need not further determine whether this was a change of position, a waiver or stipulation." (Pet. p. 20a.)

The Government ignores and side-steps as important a question as to whether the Court of Appeals can decide a case on issues not tried or presented in the Court below, and on matters dehors of the Record, presented for the first time, to the Appellate Court, by argument in, and "appendices" to the briefs.[4]

The Government completely side-steps and ignores the important question as to whether the Government, in violation of the statutory mandate to use insurance funds for the benefit of the lessee and for the restoration of the premises,

---

[3] During the oral argument before the Court of Appeals for the Fifth Circuit, one of the Appellate Judges specifically asked Counsel for the Government whether it was his position that the United States Attorney could not bind the United States Government to a limitation of issues as in the instant case. Appellate Counsel for the Government (who had taken no part in the proceedings below), specifically told the Court that it was the Government's position that the United States Attorney did not have the right to agree to a pre-trial limitation of issues as had been agreed in this case.

[4] For instance, the Appellate Court held that it is an "undisputed fact" that consent was never given by the Secretary of Defense to the sale of the leased Shipyard. There is no word, no phrase, no clause in the entire Record from which even such an inference can be made. In fact, the only inference from the Record is to the contrary.

could, by merely and arbitrarily determining *not* to restore such premises, become the beneficiary of a "wind-fall"[5] and, cover into the Treasury, funds not compensating the Government for any loss, but belonging to private citizens.[6]

The Government ignores and side-steps the fact that it takes inconsistent positions with respect to realty and personalty destroyed.

Still more important, however, the Government, in an attempt to justify its claim to the insurance proceeds and to over-simplify the issues presented below, has inadvertently pointed out that the decision of the Court of Appeals for the Fifth Circuit, if allowed to stand, establishes a new Rule of Law, which is in violation of the holdings of this Court, and, in fact, over-rules and reverses the Law of that same Circuit Court of Appeals:

Analyzing the first "Question" which the Government claims is presented (Brief Opp., p. 2), the Government in effect says:

> When the Government leases property and directs that fire insurance be obtained to cover the property, the Government is entitled to *all* the proceeds of the policies when the property is destroyed by fire.

This is just another way of saying that a lessee can have no insurable interest in leased property, particularly since it is apparent from the Record before the District Court that in the instant case the premium was paid by the lessee and the amount recovered from the Insurance Companies ex-

---

[5] The term "wind-fall" is used advisedly. The property destroyed by the fire, both real and personal, was valued at 16.54% of the total valuation of the Shipyard to the Government for use in an emergency or for sale. (R. 388-9.) The total maximum valuation—the valuation to the Government in the event of emergency—of the destroyed or damaged property, was established by the Government as of September 30, 1952 as $200,926.01. It is for this property that the Government claims it is entitled to cover into the Treasury some $763,220.00.

[6] In its Brief to the Court of Appeals, the Government admitted that if it had determined to reconstruct the lost property, a trust would have been impressed on the funds. (Pet. pp. 8-9.)

ceeded almost four times the maximum fair market value (for any use) of the property destroyed.[7]

Reading the Opinion of the Court of Appeals for the Fifth Circuit, this is indeed the holding of that Court. Ignoring entirely the holdings of the trial Court, ignoring all the provisions of the lease, the Court of Appeals holds in effect that, regardless of the amount of money recovered from the insurance policies, regardless of the special language of these policies, regardless of the provisions of the lease or applicable Statutes and Regulations, Petitioner, the co-insured, who paid for all premiums, has *no* insurable interest under its leasehold, renewal rights or option, and therefore the Government is entitled to all the proceeds.[8]

That even a month-to-month's leasehold and an inchoate right as the option provisions of the lease, convey an insurable interest, is the law as established by many Circuit Courts of Appeals. (See: *Southwestern Graphite Co.* v. *The Fidelity and G. Ins. Corp.*, 201 F. 2d, 553 (C.A. 5, 1953); and *Smith* v. *Royal Ins. Co.*, 111 F. 2d 667 (C.A. 9, 1940), cert. den. *Royal Ins. Co.* v. *Smith*, 61 S. Ct. 43, 311 U.S. 676, 85 L. Ed. 435.

The holding of the Circuit Court of Appeals for the Fifth Circuit, clearly in conflict with these decisions, requires the Granting of the Writ for clarification of this apparent conflict between the instant decision of the Court of Appeals for the Fifth Circuit and its previous decision in *South-*

---

[7] In the case of the personal property, the Government conceded that even by its exaggerated measure of "fair market value" (the replacement price), it could not claim the entire insurance proceeds, and therefore in its pleadings and throughout the entire proceedings, did not lay claim to the entire insurance proceeds, but only to a portion thereof.

[8] The Editors of the West Publishing Co. interpret the holding of the Court of Appeals similarly, as is shown by Headnote #2, reading as follows:

"Provision in government's lease of portions of shipyard, requiring lessee to procure and maintain fire insurance in specified amounts, was valid and entitled the government to proceeds of the insurance in the full specified amounts and not merely to extent of market value, though lessee had paid extensive premiums and spent large sums in rehabilitating and improving the property, as required by lease."

western Graphite Co., supra, and the conflict with the holding in *Smith* v. *Royal*, supra, in which this Court denied Certiorari.

Although the foregoing question is one which in and of itself requires review by this Court, Petitioner earnestly submits that the over-riding question for review arises from the action of the Court of Appeals in ruling, in effect, that under circumstances where there is money to be recovered by the Government, the Government is bound only by rules of expediency and not by law. In other words, even though the Government voluntarily, for good consideration, and through its authorized Attorney, limits the issues in a particular case, and only the limited issue is litigated, on appeal (if the decision of the Court of Appeals is permitted to stand) the Government may ask for a hearing *de novo* by a court of appeals based on an incomplete Record and upon additional "evidence" offered in the form of statements of Counsel and "appendices" to briefs.[9]

The Brief in Opposition attempts to gloss over this in its "Argument" by the footnote statement at page 15, that, "we know of no such written or oral 'stipulation.'" Yet, the Government on the next page, p. 16, quoting and adopting language from the Appellate Court's Opinion, admits the existence of this stipulation, but calls it a "contemporary situation created by the preliminary ruling." And, in its "Statement," the Government admits as a fact, at page 13 of its Brief in Opposition, this very stipulation, again quoting and adopting the language of the Appellate Court, but stating in an attempt at justification,

> "That it [the Government] had to adapt itself to the '*exigencies*' of the Court's adverse rulings does not

[9] In its main brief before the Court of Appeals, the Government incorporated in an appendix new exhibits, neither offered nor proffered before the District Court, including the inter-office memorandum of the Government, which was not available to the Petitioner because of the restricted pre-trial discovery.

convict it of changing horses in midstream." (Emphasis supplied.) [10]

The fact remains that there WAS an agreement and stipulation limiting the litigation in the District Court to the sole and single issue of the "Fair Value" of the Government property lost. And only this single issue WAS litigated at the trial in the District Court. And the Government did not, in any way, while this case was pending before the District Court, take a contrary position or even effectively reserve its right to do so.

In its Brief in Opposition, the Government attempts to show that the stipulation (or whatever else it may be called, that the Government entered into to "adapt itself to the exigencies") was not fully adhered to by the Government throughout the District Court proceedings or that sufficient reservation was made, expressly or impliedly, to permit the Government to recede from it on appeal. This is not true, and the Record references of the Government are inaccurate.

The Government now claims that its pre-trial Motion for Summary Judgment was grounded on a theory asserting in effect that Petitioner had no insurable interest under the policies. (Br. Opp. p. 15.) The Record below clearly shows that that motion merely re-introduced (with supporting affidavits) a previous Motion for Judgment on the Pleadings, premised on the novel theory that Petitioner was a "defaulting lessee" and estopped to claim any insurance

[10] The "exigencies" of which the Appellate Court spoke in its Opinion in the Court of Appeals, were brought about by the circumstances, including Petitioner's claim that the option had been fully exercised, Petitioner's statement to the District Court that it had reason to believe that incontrovertible documentary proof of the approval of the sale of the property to Petitioner was available in Government files, and Petitioner's demand for pre-trial discovery, including depositions. After a series of delays, during which time the United States Attorney conferred with the Government agencies involved, Petitioner's discovery was restricted to matters involving the market value of the Government property lost, the Government amended its pleadings to claim only the "actual value" which it had lost, and the issues in the case were limited to the sole issue of the fair value of the Government loss.

proceeds. The alleged "default" was the sole fact that the insurance policies formally named the Petitioner as co-insured. This motion certainly cannot be considered a reservation of right or change of position.

"Reiterated 'comments' of Government counsel," (allegedly supported by a number of Record References, Br. Opp., p. 10) are supposed to support the contention that the Government did not adhere to its stipulation before the District Court. These very references (particularly R. p. 431) indicate that the Government's entire position at trial before the District Court was that "Market Value" approximated or exceeded "Insured Value."

Thus, on the pleadings, and on trial before the District Court, this case was tried and adjudged on the sole issue of the market value of the Government loss. Under these circumstances, even if the entire Record of the District Court had been before the Court of Appeals, there could be no Record on the precluded issues as to the Exercise of the Purchase Option or the Accountability of Petitioner for property destroyed. Even the complete District Court Record (including all Proffers of Evidence), just as the partial printed Record which was before the Court of Appeals, is a record only with respect to the issue of fair market value.

The Government reversed its position in the Court of Appeals. But the Court of Appeals adopted the new Government position. Certainly, under these circumstances, the Court of Appeals' decision stands squarely as a precedent for applying the rules of expediency rather than law to the Government. What the Court of Appeals has said in just so many words, is that what amounts to a binding stipulation when two private citizens enter the market place (or the Courts), is only a transient position when the Government is involved, because of the right of the Government, in the language of the Appellate Court, to "adapt itself to the exigencies of the Court's adverse rulings."

Over and above the far-reaching questions concerning the administration of justice in the Federal Courts, where the Government is a party and conflicting decisions in two Circuits with regard to the Insurable Interest of a Lessee, there is involved in this case a patent violation of the Constitutional rights of the Petitioner to "Due Process." By rendering Judgment on issues not litigated below, by depriving Petitioner of its opportunity to have discovery and introduce evidence on the option and other un-litigated issues, Petitioner was deprived of its "Day in Court." This Court has jealously guarded the right of the citizens of this country to obtain a full and complete hearing in the Courts under its supervision. This Court, through Mr. Justice Holmes, in a case involving a much less flagrant violation of these rights, *Saunders* v. *Shaw*, 244 U.S. 317, 37 S. Ct. 638 (1917), held:

> "He now brings this writ of error and says that he has been deprived of due process of law, contrary to the 14th Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for *when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view.* The chief justice and Mr. Justice O'Niell were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the supreme court thought that it was so plain on the uncontroverted facts that the case was within the principle of the Myles Salt Co. Case that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption, and therefore *cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.*"
> (Emphasis supplied.)

CONCLUSION

It is respectfully submitted that the Petition for Writ of of Certiorari should be granted in this case.

Respectfully submitted,

LEO L. FOSTER
Brock Building
Tallahassee, Florida

CHARLES M. TRAMMELL
HANS A. NATHAN
729 15th St., N.W.
Washington 5, D. C.
Counsel for Petitioner

January 6, 1959.